

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 457 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and

MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

MOHAMMEDBHAI BHIKHABHAI PATHAN

Versus

STATE OF GUJARAT

Appearance:

MR KJ SHETHNA for Petitioner

MR AJ DESAI ADDL.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and

MR.JUSTICE R.BALIA.

Date of decision: 06/11/96

ORAL JUDGEMENT

1. The appeal arises out of the judgement of the learned Addl. Sessions Judge, Ahmedabad (Rural), rendered in Sessions Case No. 92 of 1992 on 23.3.1993 whereby the

learned Judge convicted the accused appellant for offences under Section 302 of the Indian Penal Code and awarded life sentence.

2. The prosecution had gone before the trial court with a case that the accused was working with the deceased and on 2.4.1992 at 7.00 a.m. had gone to the house of the deceased with a scooter. The accused the deceased to accompany on his scooter and thereafter they proceeded towards Shankar Market, Sarkhej, where according to the prosecution the accused gave blows to the deceased with knife on chest, on side and other parts of the body and caused his death. The reason for the incident is said to be the suspected black magic power that the deceased had and its actual exercise in connection with the death of the brother of the accused one Suleman. The accused therefore suspected the deceased of practising black magic on his brother and thereby causing his death.

3. The prosecution had come with as many as five witnesses before the trial court and supporting the witnesses were four in number.

4. The supporting witnesses deposed to the effect that the witnesses, if at all support the prosecution case, had seen the deceased and the accused last together. So far as the defence is concerned, there is hardly any dispute in this regard.

5. With regard to the eye witnesses, there is only one witness Bijal Nanjibhai who has supported the prosecution and rest have turned hostile. The deposition of the said witness is at Exh.28 page 103 of paper book.

6. In his brief cross examination in chief, he says that he opened the gate to Shankar Market, he saw the accused given the blows and this they have seen from a distance from the gate. However, on coming near to the gate when they opened it, they saw one person lying on the ground and further they saw the accused running away. He identified the accused to be the person who had given knife blows.

7. However when he talks in plural in his examination in chief, he talking about his companion also one Labhubhai, who is the complainant. Incidentally, the complainant has not supported the prosecution.

8. In the cross examination of this witness, it is turned out that actually what he had seen was a person

was running away and was able to see only his back.

9. Over and above the statements of the eye witness on which the prosecution was relying upon, the prosecution had also chosen to rely upon the testimony of that very witness with regard to the accused having been identified before the Executive Magistrate.

10. With regard to this identification parade also, the prosecution before the trial court could not have placed any reliance because all those witnesses were brought before the executive Magistrate for identifying the accused have admitted in their respective cross examinations that the accused was shown to them prior to the parade and this was done by the police at the police station itself. This has been clearly stated to be the position by the said Bijalbhai and Labhabhai who is also one of the witnesses in the identification parade.

11. As if this is not enough in the cross examination said Bijalbhai has further admitted that he saw a person running away at a distance of 400 to 500 paces and on the next day only when the person was arrested he recognised him and then he realised that he knows the man and though he realised the man, he admits that at that time he did not disclose it to the police that he knows him. He is unable to give description of the person who he claims to have seen running.

12. All this evidence points suspicious finger at the accused but that will not be enough to bring home the charge against him. We therefore do not agree with the conclusion arrived at by the learned trial Judge. In our opinion, there is no evidence at all to connect the accused with the alleged crime. The appeal is therefore allowed. The order of conviction and sentence is set aside. The accused appellant is ordered to be set at liberty forthwith, if not required for any other purpose.

(devu)